APPX. 1
APPENDIX A

1UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RODOLFO VELASQUEZ,

Plaintiff-Appellant,

Versus

ALAMEDA COUNTY SUPERIOR COURT; et al.,

Defendants-Appellees.

No. 05-15049
D.C. No. CV-04-03377-WHA

Sealed: Filed: March 27, 2006

JUDGMENT

Appeal from the United States District Court for the Northern District of California (San Francisco).

This cause came on to be heard on the transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

On consideration whereof, it is now ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and here by is **AFFIRMED.**

Filed and entered Friday, December 16, 2005.

APPX. 3
APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RODOLFO VELASQUEZ,

Plaintiff-Appellant,

Versus

ALAMEDA COUNTY SUPERIOR COURT; et al.,

Defendants-Appellees.

No. 05-15049

DC # CV-04-03377-WHA

ORDER

Sealed: Filed March 14, 2006

Before: GOODWIN, W. FLETCHER, and FISHER, Circuit Judges.

The panel has voted to deny appellant's petition for panel rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. See Fed.R.App.P.35.

The petition for panel rehearing and petition for rehearing en banc are denied.

No further filing shall be accepted in this closed appeal.

APPX. 5
APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RODOLFO VELASQUEZ,

Plaintiff-Appellant,

Versus

ALAMEDA COUNTY SUPERIOR COURT; et all.,

Defendants-Appellees.

No. 05-15049
D.C. No. CV-04-03377-WHA

Filed: December 16, 2006

MEMORANDUM

Appeal from the United States District Court for the Northern District of Clifornia
Wiliam H. Alsup, Distict Judge, Presiding

Submitted December 5, 2005

Before: GOODWIN, W.FLETCHER and FISHER, Circuit Judges.

Rodolfo Velasquez appeals pro se the district court's judgment dismissing for lack of subject matter jurisdiction his 42 U.S.C. § 1983 action challenging the constitutionality of previous state orders in an adverse possession claim and

* This disposition is not appropriate for publication and may not bi cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2). declaring him a vexatious litigant. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo, *Noel v. Hall*, 341 F.3d 1148, 1154 (9th Cir. 2003), and we affirm.

Velasquez requested that the district court declare as void the California state court decision awarding attorneys fees against him, and declaring him a vexatious litigant. Velasquez's federal suit is a forbidden de facto appeal a court judgment. *Exxon Mobil., v. Saudi Basic Indust. Corp.* 135 S.Ct. 1517, 1521 (2005). Therefore, the district court properly dismissed the action under the *Rooker-Feldman* doctrine. *Id.*

The district court did not abuse its discretion in entering a pre-filing review order against Velasquez because he had notice that the district courts was considering entering

such an order and had an opportunity to oppose it. *De Long v. Hennessey*, 912 F.2d 1144, 1146 (9th Cir. 1990), In addition, the district court found to be frivolous and repetitive and the order is narrowly tailored to "prevent infringement on [Velasquez's] right of access to the courts." Id. [citation omitted).

AFFIRMED.

APPX. 8
APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF CALIFORNIA

RODOLFO VELASQUEZ,

Plaintiff,

Versus

THE SUPERIOR COURT OF CALIFORNIA OF ALAMEDA COUNTY; BILL LOCKYER; COMMISSION ON JUDICIAL PERFORMANCE; HARRY SHEPPARD; RONALD M. GEORGE; P.J. McGUINESS; GEORGE HERNANDEZ; MARCIA TAYLOR; JUAN JUSE TELLECHEA.

Defendants.

ORDER GRANTING MOTION TO
DISMISS AND VACATING HEARING

INTRODUCTION

In this § 1983 case, plaintiff alleges that previous udgments in state court ruling against him in a adverse ɔossession action and designating him as vexatious litigant ʌiolated his rights under the Fifth, Eighth, and Fourteenth

Amendments. Defendants have moved to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. Defendants also move for plaintiff to be subjected to pre-filing review. As described in further detail below, this order **Grants** defendants' notion to dismiss and declines to rule on the motion for pre-filing review until after a hearing.

STATEMENT

The underlying dispute in this case, which was litigated in the state court system, revolving around property owned by defendant Juan Jose Tellechea located at 1550 Pacific Avenue San Leandro. See Velasquez v. Tellechea A097319, 2003 WL 1875462 at *1 (Cal.App.1st Dis. 2003)(also submitted as defendants' Request for Judicial Notice., Exh. 2). Mr. Tellechea died in September 1996 after which plaintiff paid delinquent taxes on the property for four years. *Ibid.* Plaintiff Rodolfo Velasquez initially filed suit seeking either a security interest in the property, or in the alternative, reimbursement of the money he paid to satisfy the tax delinquency. *Ibid.* By the third amended complaint, Alberto Carrillo had joined as plaintiffs; together they sought title to the property on the theory of adverse possession. Ibid.

In summary, the state courts found that plaintiffs failed to state a claim because the complaint failed to allege when they first possessed the property and that their possession was exclusive, hostile and adverse. *Id* at * 3. Moreover, plaintiffs' own allegation indicated that their possession was not hostile because they had permission from Mr. Tellechea to move onto the property. The pleading also

demonstrate that plaintiffs could not prevail because the Administrator of Mr. Tellechea's estate filed an unlawful detainer action on March 19, 2001, which effectively terminated plaintiffs' claimed period of adverse possession before the five years required by statute. *Id* at *5.

Judgment in the unlawful detainer action was rendered against plaintiff (Request for Judicial Notice, Exhs 14 & 17). As for plaintiff's adverse possession action, the Superior Court of California of Alameda County sustained a demurrer to the third amended complaint (Request for Judicial Notice, exh. 19)[4] The Superior Court's decision to sustain a demurrer was subsequently affirmed by the Court of Appeals. *Velasquez,* 2003 WL 1875462 at *5. The Supreme Court of California declined to review the case (Request for Judicial Notice, Exh. 1). Plaintiff did not appeal to the United States Supreme Court.

Plaintiff has been recognized as a vexatious litigant by the state courts since January 18, 1996 (Request for Judicial Notice, Exh. 29). Although Plaintiff successfully moved to set aside this vexatious litigant order on June 27, 2002, the Superior Court of Solano County subsequently retracted the decision on September 30, 2002, finding that it had no jurisdiction to rescind the original order from six years ago (Request for Judicial Notice, Exhs, 27-28). Furthermore, Judge Scott Kays found that plaintiff had previously failed to point out that he had assistance of

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[4] In addition to the two actions described above, plaintiffs also attempted to contest Mr. Tellechea's will and petition to suspend the power of the administrator of Mr. Tellechea's estate (Request for Judicial Notice, Exh. 13). Demurrer to the second amended will contest was sustained without leave to amend (Request for Judicial Notice, Exh. 15).

counsel as "[a] favorable outcome obtained with assistance of counsel has no hearing on Velasquez's classification as a vexatious litigant when presenting himself in pro per" (Request for Judicial Notice, Exh. 27 at 2).

Based on the repeated litigation of the same underlying subject matter, defendant Judge Harry Sheppard of the Superior Court of Alameda County entered orders subjecting plaintiffs to pre-filing review and awarding attorneys' fees and costs in the amount of $ 31,895.00 to the administrator of Mr. Tellechea's estate on March 12, 2002 and April 19, 2002, respectively (Request for Judicial Notice, Exhs. 12-13). More specifically, Judge Sheppard found that at least five of plaintiffs' filings before the court had been "unmeritorious" and that plaintiffs were vexatious litigants within the meaning of California Code of Civil Procedure § 391(b)(3) Request for Judicial Notice, Exh. 13 at 2).

Plaintiff now claims that the decision rendered in the Superior Court of Alameda was "unfair judgment" against him, which various judges in the state court system have "refused to overturn" (Compl. ¶¶ 3-7).[5] Plaintiff alleges a violation of 42 U.S.C. § 1983 because the decision deprived him of his constitutional rights under the Fifth, Eighth, and Fourteenth Amendments. Specifically, the complaint alleges that the subsequent order of September 30, 22002, which rescinded the order of June 27, 2002 setting aside the 1996

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[5] Plaintiff's complaint is numbered incorrectly, repeating numbers 15-17 three times. This order refers to the paragraphs of the complaint as if the had been correctly numbers – i.e., the second time 15 appears, the court considers it to be paragraph 18.

vexatious litigant order violated the double jeopardy cause of the Fifth Amendment (Comp. ¶ 19-18). Plaintiff request the Court "to reduce the judgment amount from $ 31,895.00 to $1,000.00 maximum, or in the alternative, to order a trust account be opened until" another case... Wofe v. Strankman, No. 02-15720, was appealing Case No. C-00-1047 from the Northern District of California—is decided by the Ninth Circuit (Compl.¶¶ 24-25). Wolfe allegedly challenging the constitutionality of the California vexatious-litigant statute.[6]

Plaintiff himself previously filed another case in Northern District of California, naming many of the same defendants, challenging the constitutionality of the California vexatious-litigant statute and asking for review of the state court decision designating him as vexatious litigant. In Velasquez v. State of California, case No.4:2-cv-02166, Judge Susan Brown Armstrong dismissed the complaint with prejudice on November 4, 2002. The Ninth Circuit affirmed on September 29, 2003.

ANALYSIS

1. DISMISSAL PURSUANT TO FRCP 12(B)(I).

Pursuant to FRCP 12(b)(l0, defendants contended that plaintiff's request relief – i.e., a reduction of the judgment

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[6] As the Court pointed out in its order of September 2004, the Ninth Circuit is not reviewing the constitutionality of California's vexatious-litigant statute. Rather, the issue before the Ninth Circuit is whether the district court properly dismissed the case for lack of subject-matter jurisdiction.

amount – is essentially a collateral attack on the decision rendered by the Superior Court of Alameda (Br. 3). The Court agrees. Indeed, even assuming *arguendo* that plaintiff's constitutional claim have merits, "it is evident from the face of his complaint that rather than mounting a general constitutional challenge, [he] is impermissible seeking to review the merits of sate court decision in a 'particular case.'" *Compare Branson v. Nott,* 62 F.3d 287, 292 (9th Cir. 1995) (internal citations omitted.

The *Rooker-Feldman* doctrine requires the Courts to dismiss plaintiff's complaint for lack of subject-matter jurisdiction because it is a de facto appeal from a state court judgment. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *Dist. Of Columbia Court of Appeals v. Feldman* 460 U.S. 462 (1983). "The basic premise of *Rooker-Feldman* is that 'a federal district court does not have subject matter jurisdiction to hear a direct appeal from the final judgment of state court.'" *Maldonado v. Harris,* 370 FR.3d 945, 949 (9th Cir. 2004) (citing *Noel v. Hall,* 341 F.3d 1148, 1154 (9th Cir. 2003). This doctrine "recognizes the implicit statutory structure established by Congress, which has determined that the Unites States Supreme Court is the only federal court with jurisdiction to hear appeals from state courts." *Ibid.*

Here, plaintiff choose not to appeal the state court decision to the United States Supreme Court, but claims that this court has "gained jurisdiction to independently evaluate the constitutionality [sic] excessiveness of the punitive of the punitive damages assessed against the plaintiff" by de novo review (Opp. 6-7). Contrary to plaintiff's unsubstantiated

assertion, however, this Court possesses "no power whatever to sit in direct review of state court decisions." Atl. Coast Line R.R. Co. v. Brotherhood of locomotive Eng'rs, 398 U.S. 281, 296 (1970). Indeed, our previous order of September 14, 2004 and October 5, 2004 have both emphasized that this Court does not act as a super court of appeals for appellate review of state courts judgments. Accordingly, the Court Grants defendants' motion for lack of subject-matter jurisdiction.

2.DISMISSAL PRUSUANT TO FRAP 12(b)(6).

A. LEGAL STANDARD

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) test for legal sufficiency of the claims alleged in the complaint. Parks Sch. Of *Business v. Symingon*, 51 F.3d 1480. 1484 (9th Cir. 1995). Although materials outside of the pleading should not be considered, a court may take judicial notice of "matters of public record." *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001).

All material allegations of the complaint are taken as true and construed in the light most favorable to the nonmoving party. Cahill v. Liberty must, Ins. Co., 80 F.3d 340 (9th Cir. 1996). The Court "need not, however, accept as true allegations that contradict matters properly subject to judicial notice." Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). Moreover, "conclusory allegations of law and unwarranted inferences are insufficient to defeat a

motion to dismiss for failure to state a claim." Epstein v. Washington Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996).

Complaints of plaintiffs appearing pro se are judged by a less stringent standard than pleadings drafted by attorneys. *Klingele v. Eikenberry,* 849 F.2d 409, 413 (9th Cir. 1988). Even so, a pro se litigant may be denied leave to amend the complaint where it is "absolutely clear that the deficiencies of the complaint could not be cured by amendment." *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

B. INSUFFICIENCY OF PLAINTIFF'S ALLEGATIONS

Even if the Court were to find that Rooker-Feldman doctrine did not apply, plaintiff's complaint should still be dismissed pursuant to FRCP 12(b)(6) because it fails to state a claim. First, the various judges and state officials named as defendants enjoy judicial and sovereign immunity. See e.g., *Stump v. Sparkman*, 435 U.S. 349, 355-57 (1978); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66 (1989). Plaintiff's complaint fails to allege any waiver of immunity. Second, even assuming arguendo that the defendants are not immune from suit, they did not deprive plaintiff of any constitutional rights in violation of 42 U.S.C. § 1983.

The parties agree that the California vexatious-litigant statutes have repeatedly been upheld as constitutional. See e.g., *Taliaferro v. Hoogs*, 236 Cal. App.2d 521, 525-59

(Cal.App. 1st Dist. 1965); *First Western Development Corp. v. Superior Court*, 212 Cal.App..3d 860, 868 (Cal.App.2d Dist. 1989); *Wolfgram v. Wells Fargo Bank*, 53 Cal.App.4th 43, 56-58 (Cal.App.3d Dist. 1997). Plaintiff asserts that these decisions "are far from 'conclusive'" because neither the California Supreme Court nor the United States Supreme Court have ruled on the issues (Opp.9). The court is unpersuaded by this argument. As the parties have cited no lower court decisions holding the California vexatious-litigant statute unconstitutional, there appears to be not conflict for the California Supreme Court or the United States Supreme Court to resolve.

Furthermore, plaintiff's allegations that defendants violated the Fifth Amendment prohibition against double jeopardy are wholly without merit. The double jeopardy clause, providing that no persons shall "be subjected to the same offense to be twice put in jeopardy of life or limb" only applies to successive *criminal* proceedings. See *United States v. Lasky*, 600 F.2d 765, 767 n.1 (9th Cir. 1979). Because the previous litigation in state courts was civil, double jeopardy does not apply here. Even if it did apply, the reinstatement of an order that the Superior Court of Solano had no jurisdiction to rescind is not a violation of double jeopardy clause. The mere fact the award of attorneys' fees and costs was entered on a different day than the judgment does not violate the double jeopardy clause either.

As for the assertion that award of $31,895.00 was an excessive punishment in violation of the Eighth and

Fourteenth Amendment, plaintiff's complaint fails to allege that the amount $ 31,895.00 was an inaccurate calculation of attorneys' fees and costs, much less an excessive one. On the contrary, Judge Sheppard's order awarding attorneys' fees and costs found both the number of hours expended and the attorney's hourly rate reasonable for someone of the experience (Request for Judicial Notice, Exh. 12).

Plaintiff merely alleges that this amount is excessive "complaint [sic] with the extent of the offense" (Comp. ¶ 18). It appears that plaintiff views this amount as excessive because it is "73% out of his yearly salary" (Opp. 5). Indeed, plaintiff argue that the Court should calculated the award of attorneys' fees and costs based on his annual salary to find "1.4% out $43,865.00 [sic] equal to $614.11 instead of $31,895.00" (Opp. 14). The Court finds no basis for calculating and award of attorneys' fees and costs in the manner.[7]

Because the deficiencies in plaintiff's allegations would not be cured by amendment the Court **DISMISSES THE COMPLAINT WITH PREJUDICE.**

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[7] Plaintiff primarily relies on a case from the criminal context as the source for his proposed equation. Compare United States v. Bajakajian, 524 U.S. 521, 337-38 (1998). The order case cited in the opposition brief is also inapposite. Compare BMW v. Gore, 517 U.S. 559 (1996) (finding a $2 million award of punitive damage—not attorneys fees or costs—grossly excessive.

CONCLUSION

For the aforementioned reasons, defendants' motion to dismiss is **GRANTED.** Because it would be futile to grant leave to amend, Plaintiff's complaint is **DISMISSED WITH PREJUDICE.** The December 30, hearing on this motion is vacated.

Defendants also move for an order requiring pre-filing review of any future actions plaintiff files in propia persona. Pursuant to 28 U.S.C. 1651, a district court has the inherent power to issue an injunction against repetitive litigation. Wood v. Santa Barbara Chamber of Commerce, 705 F.2d 1515, 1524 (9th Cir. 1983)(initial citations omitted). The Court mindful, however, of "the particular caution with which such orders should be issued," specially against a pro se plaintiff. De Long v. Hennessey, F.2d 1144, 1147 (9th Cir. 1990). Plaintiff's opposition brief did not directly address this motion the court hereby provides plaintiff with an additional opportunity to oppose defendants' motion for pre-filing review. Plaintiff shall submit a supplemental opposition brief by JANUARY 6, 2005. The hearing on this motion is continued to **JANUARY 13, 2005 at 2 p.m.**

IT IS SO ORDERED

Dated: December 23, 2004

WILLIAM ALSUP
UNITED STATES
DISTRICT JUDGE